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TTAB

Ann Rosevear, Esq.
Nevada State Bar #7509
Walsh, Baker & Rosevear P.C.
9468 Double R. Blvd., Suite A
Reno, Nevada 89521
775.853.0883 telephone
775.853.0860 facsimile

Attorney for Applicant



07-06-2004

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

IN THE UNITED STATES AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Leo Stoller d/b/a,
CENTRAL MFG
P.O. Box 35189
Chicago, IL 60707-0789

Opposer,

vs.

AIRFRAME BUSINESS SOFTWARE, INC.
800 Southwood Blvd., Suite 105
Incline Village, Nevada 89451

Applicant. ,

Trademark:

AIRFRAME BUSINESS SOFTWARE,
INC.

Opposition No.: 91160234
Application SN: 78-233,204
Int. Class No: 09

AFFIDAVIT OF MAILING

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, Ann Rosevear, do hereby swear, under penalty of perjury, that the assertions of this Affidavit are true.

That Affiant is, and was when the herein-described mailing took place, a citizen of the United States, over 18 years of age, and not a party to, nor interested in, the within action, that on July 2, 2004, Affiant deposited in the United States Post Office at Reno, Nevada, a copy of the following document:

APPLICANT'S OPPOSITION TO OPPOSER'S MOTIONS and

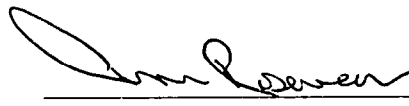
APPLICANT'S MOTION FOR RULE 11 SANCTIONS.

1 The above-described documents was enclosed in a sealed envelope upon which first-class
2 postage was fully prepaid, addressed to:

3 United States Department of Commerce
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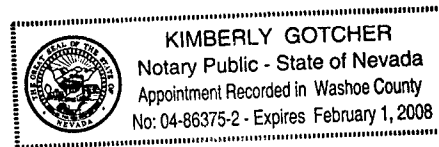
Leo Stoller
Central Mfg., Trademark and Licensing
Post Office Box 35189
Chicago, IL 60707-0189

7 DATED this 2nd day of July, 2004.

8 
9 Ann Rosevear

10 Subscribed and Sworn before me
11 This 2nd day of July, 2004

12 
13 Notary Public



ORIGINAL

Ann Setty-Rosevear, Esq.
Nevada State Bar 7509
Walsh, Baker & Rosevear, PC
9468 Double R Blvd., Ste. A
Reno, NV 89521
Telephone: (775) 853-0883
Facsimile: (775) 853-0860

Attorney for Applicant

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) Trademark:
) AIRFRAME BUSINESS SOFTWARE,
) INC.
)
) Opposition No.: 91160234
) Application SN: 78-233,204
) Int. Class No: 09
)
) Applicant's Opposition to Opposer's
) Motions:
) 1) to Strike Affirmative Defenses;
) 2) to Dismiss Applicant's Counterclaims
) under FRCP 12(b); and
) 3) for Rule 11 Sanctions; AND

Applicant's Motion for Rule 11 Sanctions.

Applicant's Opposition to Opposer's Motions

COMES NOW Applicant, AIRFRAME BUSINESS SOFTWARE, INC., by and through undersigned counsel, and submits this Opposition to the following Motions of Opposer:

1. Motion To Strike Applicant's Affirmative Defenses, filed on or about June 18, 2004; and
2. Motion To Dismiss Applicant's Counterclaims Under FRCP 12(b), filed on or about June 19, 2004; and
3. Motion for Rule 11 Sanctions, filed on or about June 25, 2004; AND

1 COMES NOW Applicant, AIRFRAME BUSEINSS SOFTWARE, INC. by and through
2 undersigned counsel, and moves the Board for an Order finding Opposer Central Mfg. and its President
3 and agent, Leo Stoller, in violation of FRCP 11.

4 This Opposition and Motion are based upon the file and pleadings therein to date and the
5 following points and authorities.

6 **OPPOSITION**

7 **Brief / Points and Authorities**

8 **1. OPPOSITION TO OPPOSER'S MOTION TO STRIKE APPLICANT'S** 9 **AFFIRMATIVE DEFENSES.**

10 Airframe Business Software, Inc. ("Applicant") hereby opposes the Motion to Strike Applicant's
11 Affirmative Defenses filed by Leo Stoller d/b/a Central Mfg. ("Opposer") in the above-referenced
12 action. Opposer has moved to strike four affirmative defenses from Applicant's answer, namely, the
13 affirmative defenses of failure to state a cause of action, fraud, unclean hands and estoppel. Because all
14 of these affirmative defenses bear upon the issues in this case and raise factual issues that cannot be
15 resolved in a motion on the pleadings, and because Applicant's affirmative defenses including the
16 defense of fraud are pled with particularity, Opposer's motion to strike is inappropriate and should be
17 denied.

18 The Trademark Trial and Appeal Board Manual of Procedure (TBMP) provides: "Motions to
19 strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in
20 the case. . . . A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or
21 if it raises factual issues that should be determined on the merits." TBMP § 506.01.

22 Applicant has plead the affirmative defenses of failure to state a claim, fraud, *in pari delicto* and
23 estoppel. All of these affirmative defenses bear upon the issues of the case and raise factual issues that
24 should be determined on the merits. Opposer's cursory motion to strike does not make any showing that
25 Applicant's defenses are irrelevant to this case or that they have any "clearly apparent" insufficiencies.
26 Opposer's motion amounts to little more than Opposer's disagreement with the defenses. Under the
27 standards articulated in the TBMP, a mere dispute as to the ultimate validity of a claim is plainly not a
28 ground upon which to strike that claim.

1 All four affirmative defenses are highly relevant to a core issue in this case, namely whether
2 Opposer may bring this action against Applicant. If the facts in this case show that Opposer has
3 committed fraud, has unclean hands or is estopped from making his claims in this case, or if it is shown
4 that Opposer has failed to state a valid cause of action, Opposer's action may be dismissed. Opposer's
5 grounds for moving to strike appear to be simply that Opposer does not agree with the defenses -- for
6 example, Opposer moves to strike Applicant's First Affirmative Defense of failure to state a claim
7 because "Opposer has stated a claim upon which relief may be granted". Opposer's Motion to Strike
8 Affirmative Defenses, Pp. 1. This type of "did not/did too" argument is not sufficient grounds for
9 striking a defense. Rather, it is the crux of the matter to be determined before the Board in this
10 proceeding after the factual and legal development of the case.

11 Applicant's Second, Third and Fourth defenses must not be struck simply because Opposer
12 makes the naked assertion that "there are no substantive grounds for this type of defense". Opposer's
13 Motion to Strike Affirmative Defenses, Pp. 1. Rather, Opposer must meet its exceptionally heavy burden
14 under. TBMP § 506.01 of showing that the defenses do not bear on the case and cannot under any
15 circumstances state a valid defense to the opposition. Opposer has wholly failed to meet this burden.

16 **2. OPPOSITION TO OPPOSER'S ARGUMENT AS TO PLEADING OF FRAUD**
17 **WITH PARTICULARITY.**

18 Opposer has moved this court to strike Applicant's Affirmative Defense of Fraud (Opposer's
19 Motion to Strike filed June 18, 2004) and to dismiss Applicant's Counterclaim pursuant to FRCP 12(b)
20 (Opposer's Motion to Dismiss filed June 19, 2004). Opposer submitted similar points and authorities in
21 support of both motions, namely the assertion that the affirmative defense and the counterclaim for fraud
22 have not been pled with particularity. Opposer does not demonstrate why the affirmative defense or the
23 counterclaim for fraud is not sufficiently clear in its factual allegations.

24 Applicant's affirmative defense sets forth the basis of the fraud with sufficient specificity to give
25 Opposer notice as to the claim. In paragraphs 2 and 3 of the fraud defense, Applicant alleges that
26 Opposer has fraudulently claimed to have used and registered a mark with certain goods and services
27 when Opposer cannot show such use or registration. The defense specifies with particularity the goods
28 and services alleged to have been falsely claimed by Opposer. Opposer has not explained in any way

1 why this specification of the fraud claim is insufficient when it clearly identifies the actions upon which
2 the alleged fraud is based.

3 Applicant's Counterclaim for Cancellation also specifically informs Opposer of the fraud claim.
4 The Counterclaim identifies Opposer's registered marks and each of the many goods and services
5 identified in Opposer's registrations. Applicant specifically states at Paragraph 6 that:

6
7 "Upon information and belief, the AIR FRAME mark has not been used in commerce with all of
8 the goods and services listed in the AIR FRAME Registrations as required under the Lanham
9 Act. Because there has not been bona fide use in commerce of the AIR FRAME mark on all of
10 the goods and services listed in the AIR FRAME Registrations, the AIR FRAME Registrations
11 are invalid and should be canceled."

12 Applicant thereafter alleges the fraud committed occurred when Opposer falsely represented to
13 the Patent and Trademark Office that its marks had been used in commerce for over 150 identified
14 goods and services as varied and random as the connection between baby bibs, ping pong balls, science
15 fiction television shows and electric irons (all identified as goods using Opposer's marks). As stated in
16 Applicant's Answer, on *good information and belief*, Applicant believes that no use by Opposer of the
17 "Air Frame" marks in connection with any of these goods and services has been found to have occurred
18 in commerce. This Counterclaim is precise, specific and particular in its assertions.

19 Opposer's Motion to Dismiss Applicant's Counterclaims also moves that the Counterclaim
20 should be stricken for failure to state a claim. As set forth in the above arguments at Section 1 and
21 herein, this motion is wholly without merit. Opposer fails to cite any point other than to reiterate a
22 disagreement as to the alleged facts.

23 3. **OPPOSITION TO MOTION FOR RULE 11 SANCTIONS.**
24

25 Opposer lastly moved for FRCP 11 Sanctions against Applicant for "filing frivolous Affirmative
26 Defenses." Motion For Rule 11 Sanctions, Pp. 1. Opposer makes no argument as why the affirmative
27 defenses are frivolous. In fact, Opposer makes no argument at all; the motion merely reiterates
28 Applicant's defenses, cites the law, and prays for sanctions. Thus, due to Opposer's inadequately
supported motion, Applicant has nothing to defend. Nevertheless, as set forth in the preceding sections,

1 Applicant's affirmative defenses and counterclaims are adequately pursuant to applicable rules of
2 practice and are asserted on good information and belief. Opposer's allegation that the defenses and
3 counterclaims are frivolous is apparently based solely on Opposer's disagreement with Applicant's
4 position.

5 APPLICANT'S MOTION FOR RULE 11 SANCTIONS

6
7 Applicant herein moves the Board to sanction Opposer under FRCP 11 for filing a frivolous
8 Motion to Strike Affirmative Defenses, Motion to Strike Counterclaims and Motion for Rule 11
9 Sanctions. Each of the Motions addressed above in Applicant's Opposition are, *at best*, simply
10 recitations of Opposer's disagreement with Applicant's defenses and counterclaims. Mere disagreement
11 is frivolous grounds for a motion. Opposer's Motion for Rule 11 Sanctions is particularly egregious in
12 light of FRCP 7 and FRCP 11(b)'s protections against submission of motions that are presented for
13 harassment, to cause unnecessary delay, or to needlessly increase the cost of litigation, and Opposer's
14 long history of harassing action before this Board.

15 MOTION: Brief / Points and Authorities

16 Foremost, any motion must state with particularity the grounds therefore. TBMP §2.127 further
17 clarifies this requirement, providing

- 18
19 (a) ...It shall contain a full statement of the grounds, and shall embody or be accompanied by a
20 brief.

21 Opposer's motion fails to cite "a full statement of the grounds" upon which relief can be granted.
22 To merely propose that the facts won't support the claim is wasteful practice perpetuated to harass.
23 Even Opposer's Motion for Rule 11 Sanctions merely cites common Rule 11 law and prays for sanctions
24 – it states no grounds to prove frivolity. Applicant has no obligation to first speculate as to the grounds
25 for a motion and then attempt to adequately defend its position.

26 In particular, the FRCP 11 Motion is itself a frivolous motion. While litigants are permitted to
27 defend themselves from frivolous litigation, they have long been warned against the use of FRCP 11 as a
28 tool of harassment will be subject to sanctions. *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 548 (4th Cir.

1 1990). Opposer's FRCP 11 motion is a poorly prepared, unsubstantiated, procedurally erroneous tactic
2 to cause Applicant to incur needless litigation costs in being forced to respond. Based on the arguments
3 above, there is no conceivable conclusion in which Applicant's affirmative defenses could be
4 determined as frivolous, particularly in light of the fact that Opposer's argument against those defenses
5 was simply that Opposer disagreed with their assertions. To follow the Motion to Strike Affirmative
6 Defenses with this FRCP 11 motion clearly identifies Opposer's own motives – to unduly paper
7 Applicant and cause Applicant's resources to be needlessly expended, regardless of whether such tactics
8 comply with procedural requirements and burdens of proof.

9 These tactics are nothing new to Opposer's agent, Leo Stoller. Review of the Board's records
10 found through TTABVUE on www.uspto.gov demonstrates that Mr. Stoller has filed volumes of
11 oppositions. Most of the oppositions with significant procedural history show a scheme of abuse before
12 this Board. As the Board may know, Mr. Stoller has been previously sanctioned for frivolous litigation
13 tactics. See e.g. *S Industries v. Centra* 2000, 1998 WL 157067 and *S Industries v. Diamond*
14 *Multimedia*, 991 F. Supp. 1012 (ND Ill. 1998). In the Diamond case, the defendants were awarded
15 attorney's fees and the court stated: "The claims made by plaintiff are unsupportable and even a cursory
16 examination of the law demonstrates that fact. Plaintiff's claim [for dilution] is not only poorly drafted,
17 but frivolous as well." *Id.*

18 This Board, in Opposition No. 102,987 specifically stated that "The lack of credibility of Mr.
19 Stoller is a matter of public record". Leo Stoller regularly signs pleadings before this Board and the
20 courts. Mr. Stoller's repeated strategy is one of delay, harassment and even falsifying documents. See,
21 e.g., *S Industries Inv. v. Lamb-Weston Inc.*, 45 USPQ2d 1293 (TTAB 1997) (Opposer's certificate of
22 mailing found fraudulent). Leo Stoller has also been personally sanctioned, for making material
23 misrepresentations to the Board regarding an alleged consent to extensions of time. See *Central Mfg.*
24 *Inc. v. Third Millenium Technology, Inc.*, 61 USPQ2d 1210 (TTAB 2001).

25 The three cursory, unsupported motions delivered to this Board and Applicant representS the
26 early stages of litigation tactics that promise to perpetuate Mr. Stoller's abuse of the system if not firmly
27 and immediately reprimanded.
28


1 CONCLUSION.

2
3 Opposer's pending Motions fail to meet the requisite burden that would warrant striking
4 Applicant's Defenses and Counterclaims. Opposer clearly has adopted an overly litigious and harassing
5 mode of conduct before this Board (both in this case and others) that should itself be subject to sanctions
6 for violation of FRCP 11.

7 WHEREFORE, APPLICANT AIRFRAME BUSINESS SOFTWARE, INC. hereby
8 prays that Opposer's Motion to Strike Affirmative Defenses, Motion to Strike Counterclaims and
9 Motion for Rule 11 Sanctions be denied and dismissed in their entirety and that judgment be entered in
10 favor of Applicant on its Motion for FRCP 11 Sanctions against Opposer, awarding attorney's fees and
11 costs incurred in responding to Opposer's Opposition to Date and dismissing Opposer's Opposition in
12 its entirety with prejudice.

13 Dated this 1st day of July, 2004.

14 Respectfully submitted,

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16 _____

17 ANN ROSEVEAR, ESQ.

18 Walsh, Baker & Rosevear, P.C.

19 For Applicant Airframe Business Software, Inc.
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